Supreme Court, U.S.
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NO. 09-527

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, *et al.*,
Petitioners,

v.

BRIAN THOMAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY

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ARGUMENT IN REPLY

According to the Court of Appeals, "there exists a reasonable probability" that Thomas' new mental health evidence "would have convinced at least one juror to sentence Thomas to life imprisonment." App. 52. But the evidence, which included earlier incidents where Thomas molested infants and horses, was not mitigating at all, it was *frightening*. *Petition* at 15-16. No competent attorney would have overlooked these risks.

Thomas has no response to this basic point. First, he makes a number of procedural arguments about what the state supreme court did and did not do, hoping to justify *de novo* review. But whatever the standard of review, the Third Circuit's prejudice holding was dramatically wrong. Second, he suggests the Court of Appeals did not actually decide the prejudice issue. *Response* at 20. Not only is this hard to reconcile with the panel's language, but Thomas' lawyers recently represented *exactly the opposite* to the district court See Section 2. This is gamesmanship.

Finally, Thomas deals with the devastating facts simply by *ignoring* the negative evidence. He doesn't discuss the facts of the crime *at all*.

He offers only the most self-serving quotes from various psychiatric reports. As for the awful evidence of Thomas's brutalization of horses with a broom handle, Thomas's present counsel simply accept his own incomprehensible excuse that the whole thing was a mistake, suggested to him by someone else. *Response* at 4.

The jury would not have been so gullible.

1. The Third Circuit failed to adequately weigh the "backfire" risks of Thomas' evidence.

The panel's two-paragraph assessment of the risks posed by Thomas' supposedly mitigating evidence was woefully incomplete. The court concluded by reversing the burden of proof: "we are not convinced that the death penalty was a *fait accompli*." App. 51.

Since the *Petition* was filed, this Court has twice re-emphasized that the "backfire" risks of mitigating evidence *must* be realistically taken into account. See Wong v. Belmontes, 130 S. Ct. 383, 387-88 (Nov. 16, 2009) ("This evidence would have made a difference, but in the wrong direction for Belmontes"); Wood v. Allen, __ U.S. __, 2010 WL 173369, *7 n.3 (Jan. 20, 2010) (prosecution would have responded with testimony about Wood's criminal history).

Thomas does not address these cases. Rather, he insists the panel applied the right standard, and he also claims that the court's consideration of the subject was not short at all – it was 11 paragraphs long, he says, not merely two. *Response* at 31-32. But the additional nine paragraphs were about something different – Thomas' refusal to present mitigating evidence. App. 42-49. *None* of that additional discussion touched on the *content* of the evidence.

As for Thomas' point that the Third Circuit applied the correct standard, *Response* at 31: This is wishful thinking. The Court *reversed* the proper analysis. While the Court of Appeals briefly recited the correct standard, its discussion illustrates the panel's apparent belief that *any* possibility of a different verdict was enough to demonstrate prejudice.[1]

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[1] Without any apparent irony, Thomas cites Woodford v. Visciotti, 537 U.S. 19, 23-24 (2002), for the proposition that appellate courts should not be so quick to condemn stray language used by lower courts. *Response* at 31. This is ironic, because Woodford actually stressed the need for federal courts to be forgiving of *state court* opinions before abandoning the mandatory deference standard. Thomas, of course, is not interested in forgiving interpretation of *state court* opinions. *Response* at 27-30 (offering complex arguments that, despite their plain language, the state courts did not decide his claim).

2. Certiorari is justified at this stage of the litigation.

Thomas says this Court should not grant *certiorari* because the Third Circuit's decision was not a final order. But given the importance of the issues finally resolved by the Court of Appeals, the prospect of a hearing only makes the case for *certiorari* stronger.

This Court certainly has the power to review cases that have not yet become completely final. 28 U.S.C. §1254(1). In particular, this Court has *often* granted review in such cases involving federal review of state criminal convictions, where federalism concerns are clear, and the states' power to supervise their own criminal judgments is placed in jeopardy by ongoing, overly intrusive review. E.g., Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007) (*certiorari* granted to review decision of Ninth Circuit to remand case for evidentiary hearing); Bell v. Thompson, 545 U.S. 794 (2005) (*certiorari* granted after case remanded for evidentiary hearing on claim of ineffective assistance); Strickland v. Washington, 466 U.S. 668, 679-80 (1984) (granting certiorari to review ineffectiveness standards after 6th Circuit reversed and remanded for factfinding).

As described in the *Petition*, even apart from the prejudice issue, the Third Circuit made

a number of important errors that will not be rendered moot if the case is left alone. *Petition* at 32-39. In particular, the panel's holding that lower state court opinions are often not entitled to deference has been repeatedly relied upon by other courts in the few months since the opinion below was issued.[2] Thomas does not even engage this important holding.

Thomas suggests that the Third Circuit did *not* finally decide the prejudice issue. *Response* at 20. That is disingenuous, because Thomas' lawyers made exactly the *opposite* representation a few weeks ago before the district court, at a status hearing. Transcript at 10, Thomas v. Horn, No. 00-803 (9/2/09) (counsel for Thomas: "In the opinion itself, they actually twice find that prejudice has been established. ... [T]hat's the direct conclusion of the Court and the scope of the remand stated in those terms by the Court itself").

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[2] Simmons v. Beard, 590 F.3d 223, 233 (3rd Cir. Sep 11, 2009); Boyd v. Waymart, 579 F.3d 330, 334 (3rd Cir. Jul 31, 2009) (*en banc*) (Scirica, C.J., with Ambro, Fuentes, and Fisher, J.J., concurring in judgment); Corredor v. Coleman, 2010 WL 391413, *7+ (E.D.Pa. Jan 26, 2010); Simmons v. DiGuglielmo, 2009 WL 2835261, *6+ (E.D.Pa. Aug 28, 2009); Policastro v. Tenafly Bd. of Educ., 2009 WL 2232525, *6 (D.N.J. Jul 24, 2009); Gooding v. Wynder, 2009 WL 4810587, *6 (M.D.Pa. Dec 09, 2009).

Thomas also argues that the hearing will not be an empty proceeding. He takes issue with the Commonwealth's argument that the Third Circuit considers the lack of evidence as "proof" that no investigation took place. *Response* at 26-27. He insists that if the point had been "proved" there would be no need for a hearing. But "proof" and "proved" mean two different things. The Court of Appeals said quite clearly that the lack of evidence *may be used as proof* that counsel did no investigation. App.38. Thus, if Thomas' current lawyers simply produce no evidence at the remand hearing, their silence will conveniently be taken as evidence that prior counsel did no investigation before trial.

Thomas also makes the startling assertion that his trial lawyer is alive and may testify. Assuming that is true, it only raises a deeper question: where has he been all these years that Thomas has been attacking his conduct? It was Thomas' burden to prove that claim. There is no possible excuse for his failure to make *any* prior proffer about what his lawyer might say. Testimony from trial counsel at this late stage would certainly be barred because Thomas failed to even mention it in state court. See 28 U.S.C. §2254(e)(2). In any event, in light of the passage of time, even the rather shocking appearance of trial counsel is unlikely to uncover any actual proof of what happened 25 years ago.

3. The jury would have been able to consider the damaging aspects of Thomas' supposedly mitigating evidence.

The various mental health reports contain a great deal of *negative* information – that Thomas was dangerous, sadistic, and a serial sexual attacker. Thomas argues, however, that the jury could not lawfully consider this as aggravation. *Response* at 34-35 n.12.

Under Pennsylvania law, however, once Thomas attempted to argue that his character and background were somehow mitigating, these negative conclusions and Thomas' prior bad acts were clearly admissible as rebuttal. See, e.g., Commonwealth v. Peterkin, 649 A.2d 121 (Pa. 1994) ("character and background evidence [introduced as mitigation] are subject to rebuttal with evidence of prior bad acts").

4. Whether the state courts resolved Thomas' ineffectiveness claim on the merits is an issue that is fairly encompassed by the second Question Presented.

The second Question Presented asks this Court to consider whether the Third Circuit "unlawfully failed to apply the deference

standard" where both the state appellate court *and* the state trial court "rejected Thomas' ineffectiveness claim on the merits." *Petition* at 1. In the body of the *Petition*, the Commonwealth explains *why* these were merits decisions (rather than procedural decisions) and thus were owed deference. Thomas argues that this argument somehow goes beyond the issue presented.

Thomas' argument is free of common sense. The question of whether *these* state decisions constituted "adjudications on the merits" is not only encompassed by the Question Presented, it is the *whole point*. The issue certainly meets the standard of Rule 14.1(a), which declares that the Question Presented "is deemed to comprise every subsidiary question fairly included therein." See also Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978) (questions "essential to analysis" of the issue presented are "fairly comprised" by the issue presented).

5. The state courts' rejection of the ineffectiveness/mitigation claim is due deference.

Despite Thomas' insistence that the state courts did not decide some of his claims, or decided the wrong claims, the procedural maze he constructs cannot change the issue. The state courts were *clear* that, in their view, none of Thomas' piled-on allegations overcame his flat

refusal to allow any mitigation. The only question is whether this was a reasonable application of the law.

a. The state courts identified the correct claim, and rejected it on the merits.

Thomas attempts to avoid deferential review by arguing that the rejection of his ineffectiveness claim by the Pennsylvania Supreme Court was "neither a procedural bar ruling nor a merits ruling." *Response* at 13 n.3.

There is no third category: the state courts rejected the ineffectiveness claim on the merits, or on procedural grounds. If it was a merits ruling, Thomas must demonstrate that it was unreasonable; if it was a procedural decision, Thomas must show that it was unworthy of respect in federal court.

The correct view is that the state courts rejected Thomas' ineffectiveness claim on the merits, repeatedly. *First*, Thomas argued on direct appeal that his lawyer should have presented mitigating testimony from family members. The state supreme court rejected this claim, because – unmentioned by Thomas at the time – he had *refused* to allow *any* mitigating evidence. Commonwealth v. Thomas, 561 A.2d 699, 710 (Pa. 1989) That is a merits decision which stands unless reasonable – a difficult

showing, given this Court's decision in Schriro, 127 S. Ct. at 1939.

Next, Thomas argued on collateral review that with better advice, he would not have refused to present mitigating evidence. But the underlying factual allegations were exactly the same. The state trial court held, correctly, that the core of this issue had been previously litigated – that is, the state supreme court had already held that Thomas' refusal to present mitigating evidence defeated a claim of ineffectiveness. App. 121-22. In the alternative, the trial court found that Thomas' "mitigating" evidence would not have changed the verdict anyway. App. 122-23. Under Cone v. Bell, 129 S. Ct. 1769, 1780 (2009), the "previous litigation" ruling was a *merits* decision to which AEDPA applies. The alternative "no prejudice" ruling was *also* plainly a merits ruling.

Finally, on appeal from the denial of collateral review, Thomas made a similar claim, but for the first time he claimed mental illness as a mitigating circumstance. The state supreme court, however, agreed with the lower court, that the Court's conclusion on direct appeal – counsel could not be ineffective because Thomas refused to present any evidence of mitigation – was still just as valid as ever. Commonwealth v. Thomas, 744 A.2d 713, 714 n.3 (Pa. 2000). Again, under

Cone, this was a merits ruling, to which deference applies.

Thomas, however, insists that the state supreme court decided the *wrong claim*. Thomas says that his *real* claim on direct appeal was that counsel didn't tell him that mitigation evidence could be *unrelated to the crime*, while the state Court phrased the allegation as being that counsel did not tell him about the availability of mitigating evidence *at all*. *Response* at 28. But the state supreme court was clearly referring to the claim in shorthand – there was no dispute that Thomas knew he could present mitigation evidence and that he refused. It was for that reason the state supreme court denied the claim.[3]

On appeal from the denial of collateral review, Thomas argued again that his counsel was ineffective for not presenting mitigating evidence. The state supreme court held that

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[3] Thomas insists that the Third Circuit took no position on whether a defendant's refusal to present mitigating evidence must be knowing and voluntary. *Response* at 32; App. 50 n.9. That is what the panel said, but it makes little sense. The panel (and Thomas) fault the state court for *not* considering whether Thomas truly "understood" what he was doing, and indeed that seems to be the entire basis for *de novo* review (because the state courts did not consider this argument), as well as for distinguishing Schriro. App.35.

more allegations about mitigation that his lawyer should have presented, were encompassed by Thomas' refusal to allow *any* mitigation. 744 A.2d at 714 n.3.

b. The Pennsylvania Supreme Court's decision on collateral review was substantive, not procedural.

The Third Circuit also held that the Pennsylvania Supreme Court "declined to reach the merits" of the ineffectiveness claim, by rejecting it as "previously ... decided." App.34. If it was not a merits decision, then it was a procedural decision, which did not trigger the deference standard. The panel went on to explain its view that the state supreme court's decision on direct appeal did *not* encompass the later ineffectiveness claim; the end result, the panel concluded, was "*de novo*" review. App. 35-36.

Under Cone, however, a finding of "previous litigation" is a merits decision, so the federal courts are limited to one question: was this an *unreasonable* decision? In other words, was it unreasonable for the state court to hold that Thomas' refusal to allow any mitigating

evidence controlled these related ineffectiveness claims?[4]

These procedural issues may seem complicated, but it all boils down to this: The state court said it was deciding the ineffectiveness claim on the merits. If Thomas disagrees with the outcome, that claim is governed by the mandatory deference standard.

6. The Commonwealth does not concede everything but prejudice.

According to Thomas, the Commonwealth *agrees* that his lawyer acted unreasonably – that is, if his proffers are true. *Response* at 24-25. Obviously, the Commonwealth does not concede that his proffers are true. To the extent Thomas means to suggest that the Commonwealth's

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[4] Thomas argues that the Court of Appeals did exactly what this Court did in Cone, but that is not so. There were two relevant holdings in Cone: (1) the "previous litigation" bar amounted to a merits ruling; and (2) the state court made a simple mistake, because the particular claim of prosecutor misconduct had not been earlier addressed. 129 S. Ct. at 1780. Here, there is no such simple factual mistake. There is only an alleged *legal* mistake, that is, the state supreme court believed that Thomas' refusal to allow any mitigation evidence encompassed his later claim, while Thomas disagrees. That *legal* dispute is subject to deference review.

arguments are *only* relevant to prejudice (rather than whether counsel's actions were reasonable), this is not so. If particular "mitigating" evidence is not believable, or it is risky, or it contradicts what is before counsel's own eyes, then counsel may reasonably choose not to pursue it.

7. The Commonwealth has not somehow waived its right to a hearing.

The Third Circuit was wrong to find that Thomas had established prejudice without at least a hearing. But Thomas argues that the Commonwealth "waived" its right to a hearing by not asking for one in the Third Circuit. *Response* at 20, 27. That is a remarkable argument: When the State argues that habeas relief should be *denied* without a hearing, it does not thereby agree that relief can be *granted* without a hearing. It is the same principle that governs any garden-variety motion to dismiss – if the motion is denied, the moving party has not given up its right to a trial.

CONCLUSION

For the reasons set forth above, and in the *Petition for Writ of Certiorari*, petitioners request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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